85-975

Supreme Court, U.S.
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ROSS BICYCLES, INC.,

Petitioner,

vs.

CYCLES USA, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. CAN A LATE COMER AVOID THE CONSEQUENCES OF TRADEMARK INFRINGEMENT BECAUSE HE ADOPTED A CONFUSINGLY SIMILAR MARK IN GOOD FAITH.

II. WHERE A TRADEMARK OWNER HAS USED A TRADEMARK FOR MORE THAN 36 YEARS ON BICYCLES OF EVERY TYPE AND SIZE AND SPENDS MORE THAN ONE MILLION DOLLARS A YEAR FOR ADVERTISING, SHOULD A NEWCOMER, HAVING PRIOR KNOWLEDGE OF THE TRADEMARK OWNER'S USE OF THE TRADEMARK, BE PERMITTED TO USE A TERM THAT IS SIMILAR IN SOUND AND APPEARANCE WITH THE TRADEMARK OWNER'S TRADEMARK ON EXACTLY THE SAME GOODS.

LIST OF PARTIES

1. Ross Bicycles, Inc., a New York corporation, is the Petitioner herein and

was the Plaintiff in the United States District Court for the Northern District of Florida and was the Appellant in the United States Court of Appeals for the Eleventh Circuit. Ross Bicycles, Inc. has no subsidiaries not wholly owned and it has no affiliates or related companies.

2. Cycles USA, Inc. is the Respondent herein and was the Defendant in the United States District Court for the Northern District of Florida and was the Appellee in the United States Court of Appeals for the Eleventh Circuit. In February, 1985, the Court of Appeals was advised of Respondent's change of name from East Coast Cycles and Imports, Inc. to Cycles USA, Inc.

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PETITION FOR WRIT OF CERTIORARI TO
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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Ross Bicycles, Inc., petitioner herein, prays that a writ of certiorari issue to review the judgment of

the United States Court of Appeals for the Eleventh Circuit entered in this case on July 22, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, affirming the trial court, was filed on July 22, 1985 and is reported as: Ross Bicycles, Inc., v. Cycles USA, Inc., 765 F. 2d 1502 (11th Cir. 1985). (Appendix A.) The judgment of the United States District Court for the Northern District of Florida, entering judgment in favor of the defendant and against the plaintiff, was filed on April 30, 1984 and is reported as: Ross Bicycles, Inc. v. East Coast Cycles, Inc., 224 U.S.P.Q.

725 (N.D. Fla. 1984). (Appendix B.) A copy of the decision of the trial court also appears as an appendix to the opinion of the United States Court of Appeals for the Eleventh Circuit 765 F. 2d 1504 et seq.

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was filed on July 22, 1985. A timely petition for rehearing was denied on September 6, 1985. (Appendix C.) (Supreme Court Rule 20.4) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) and 28 U.S.C. 2101(c).

UNITED STATES STATUTES INVOLVED

The following federal statutes are involved:

"Any person who shall, without the consent of the registrant -

(a) use in commerce any reproduction, counterfeit, copy or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or

(b) reproduce, counterfeit, copy or colorably imitate a registered mark and apply such reproduction, counterfeit, copy or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive;

shall be liable in a civil action by the registrant for the remedies herein provided..." 15 U.S.C. 1114(1).

STATEMENT OF THE CASE

Petitioner is the owner of the trademark ROSS on and in connection with bicycles and is the owner of the U.S. Trademark Registration No. 980,887 for the said trademark. Since 1946, petitioner has manufactured and sold over ten million bicycles bearing the trademark ROSS, and petitioner sells a complete line of bicycles including children's, BMX, touring, cruiser, mountain, racing and stationary exercise bicycles. Petitioner advertises its bicycles in bicycle magazines and promotes sales with catalogs, brochures and point-of-sale materials and by participation in trade shows and the sponsorship of racing teams. Petitioner currently spends in excess of one million

dollars per year for advertising.

Thirty-six years after Petitioner's first use of ROSS, respondent adopted and used BOSS Cruiser in connection with the sale of bicycles. At the time that respondent adopted BOSS Cruiser, it knew of petitioner's prior use of the trademark ROSS. Respondent promotes its BOSS Cruiser bicycles through trade shows, by use of posters and other point of sale materials and through advertising in bicycle magazines.

Petitioner's and respondent's bicycles are distributed through the same type of stores, and some of these stores sell bicycles of both companies.

There are obvious similarities between the appearance and sound of the marks ROSS and BOSS, and both marks end in "oss."

Therefore, petitioner believes that there is a likelihood of confusion and that respondent should be required to

cease and desist from all further use of BOSS as a name or trademark in connection with bicycles.

Petitioner commenced action against respondent in the United States District Court for the Southern District of New York, alleging trademark infringement and false designation of origin. The basis for federal jurisdiction is 28 U.S.C. 1331 and 28 U.S.C. 1338(a), as this case arises under the Trademark Laws of the United States of America, specifically 15 U.S.C. 1051 et seq. Pursuant to 28 U.S.C. 1404, the venue of the action was transferred from the United States District Court for the Southern District of New York to the United States District Court for the Northern District of Florida.

Trial to the court was held from March 26, 1984 through March 29, 1984,

in Tallahassee, Florida, and the court rendered its decision in favor of respondent on April 30, 1984.

Petitioner appealed to the Court of Appeals for the Eleventh Circuit, which affirmed the judgment. A petition for rehearing was denied. Petitioner now asks the Supreme Court of the United States to review this case which has national importance, which creates a conflict between the various Courts of Appeal and which has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's Decision Is of Great National Importance

In making its decision, the District

Court correctly noted that "the critical question under this section is whether there is a likelihood of confusion, mistake, or deception between the registered mark and the allegedly infringing mark" (224 U.S.P.Q. at 727) (Appendix B-12), citing John H. Harland Co. v. Clarke Checks, Inc., 711 F. 2d 966 (11th Cir. 1983). Again citing Harland, the trial court said that among the factors to be considered when analyzing the likelihood of confusion between two marks are: (1) the type of trademark; (2) the similarity of design; (3) the similarity of the products; (4) the identity of the retail outlets and purchasers; (5) the similarity of advertising media used; (6) the defendant's intent; and (7) evidence of actual confusion. This test is substantially the same in all of the Circuit Courts of Appeal, and the only

distinction is the particular wording to describe these factors. Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F. 2d 1001, 1015-6 (9th Cir. 1985); Marathon Manufacturing Company v. Enerlite Products Corporation, 767 F. 2d 214, 217 (5th Cir. 1985); Frisch's Restaurant, Inc. v. Shoney's Inc., 759 F. 2d 1261, 1264 (6th Cir. 1985); Thompson Medical Company, Inc. v. Pfizer Inc., 753 F. 2d 208, 213-4 (2d Cir. 1985); Pizzeria Uno Corporation v. Temple, 747 F. 2d 1522, 1527 (4th Cir. 1984). Only in this sense is the court's decision consistent with the prior decisions of the other Courts of Appeal.

The court's decision breaks down, however, when it determined only the intent factor in favor of the respondent. The court specifically determined that petitioner's mark is arbitrary, that it

it may be considered strong, there are obvious similarities between the appearance and sound of the marks, the products of both are bicycles, the parties sell their products through the same type of retail outlets and in some cases in the same stores, and the parties use similar methods of advertising. Stating that evidence of actual confusion is not necessary to a finding of likelihood of confusion, the court determined that plaintiff presented no clear evidence of instances of actual confusion at trial pointing out that no customers or potential customers testified as to confusion. The only factor determined in respondent's favor was that defendant acted in good faith in adopting BOSS Cruiser.

We are thus left with a situation where the trial court determined that there was no likelihood of confusion

simply because the alleged infringer acted in good faith.

If one can avoid the consequences of trademark infringement by showing that they acted in good faith, our Trademark Law would become meaningless and trademarks may become easy prey to the unscrupulous. Good faith cannot be a defense to trademark infringement, and the reason is clear. If potential purchasers are confused, no amount of good faith on the part of the alleged infringer can make these purchasers less confused. Fuji Photo Film Company, Inc. v. Shinohara Shoji Kabushiki Kaisha, 754 F. 2d 591, 596 (5th Cir. 1985).

II. This Opinion Creates a Conflict among the Circuits on Matters of Trademark Infringement

The District Court and the Eleventh Circuit have given undue consideration to the fact that plaintiff presented no evidence of actual confusion and that defendant acted in good faith. While these may be two of the factors that are to be considered, the Courts of Appeals of other circuits have uniformly held that evidence of actual confusion is relevant only when there is such evidence and that defendant's intent is relevant only when there was bad faith. In other words, it is not necessary to submit evidence of actual confusion and a defendant's good faith will not insulate it from the liability of trademark infringement.

More particularly:

> "Because evidence of actual confusion is difficult to produce and frequently discounted as unclear or insubstantial...this factor is weighed heavily only when there is evidence of past confusion..." Bandag, Inc. v. Al Bolser's Tire Stores, Inc., 750 F. 2d 903, 914 (C.A.F.C. 1984).

It has therefore been determined by various Courts of Appeals that it is not necessary to prove confusion in order to prove a likelihood of confusion. Marathon, supra at 221; Pizzaria Uno, supra; WSM, Inc. v. Hilton, 724 F. 2d 1320, 1329 (8th Cir. 1984); United States Jaycees v. Philadelphia Jaycees, 639 F. 2d 134, 142 (3rd Cir. 1981).

> "Although the good faith of the infringer in adopting the infringing use is frequently interposed as a defense against this proposition, proof of actual intent to deceive is not required to sustain a conclusion of likelihood of confusion." Bandag, supra at 915.

In other words, even if the defendant has a good faith belief that adoption of its mark will not lead to confusion, that intent is not a defense if the court finds that there is a likelihood of confusion. Pizzaria Uno, supra at 1535. It has therefore been determined that a trademark owner does not have to show a wrongful intent on the part of the infringer. Transgo, supra at 1016; Fuji, supra; Coca-Cola Company v. Overland, Inc., 692 F. 2d 1250, 1256 (9th Cir. 1982); Henri's Food Products Company,

Inc. v. Kraft, Inc., 717 F. 2d 352, 359 (7th Cir. 1983).

The Eleventh Circuit and the District Court have also not given any consideration to the "second-comer" doctrine which has been followed in the other circuits.

> "As Learned Hand cogently noted: 'Why it should have chosen a mark that had long been employed by [plaintiff] and had become known to the trade instead of adopting some other means to identify [their] goods is hard to see unless there was a deliberate purpose to obtain some advantage from the trade which [plaintiff] had built up.' Indeed, it is generally true that, as soon as we see that a second comer in a mark has, for no reason that he can assign, plagiarized the 'makeup' of an earlier comer, we need no more....[W]e feel bound to compel him to exercise his ingenuity in quarters further afield." Thompson, supra at 214, quoting American Chicle Co. v. Topps Chewing Gum, Inc., 208 F. 2d 560, 562-563 (2d Cir. 1953).

Thus, the Tenth Circuit has determined that:

> "One who adopts a mark similar to another already established in the marketplace does so at his peril...because the court presumes that he can accomplish his purpose: that is, that the public will be deceived." Beer Nuts, Inc. v. Clover Club Foods Company, 711 F. 2d 934, 941 (10th Cir. 1983).

The Seventh Circuit has similarly determined that "one entering a field already occupied by another has a duty to select a trademark that will avoid confusion." Wesley-Jessen Division of Schering Corporation v. Bausch & Lomb Incorporated, 698 F. 2d 862, 867 (7th Cir. 1983).

Therefore, there is a conflict between the decision of the Eleventh Circuit and the other circuits. The

Eleventh Circuit has given too much consideration to the fact that plaintiff has not submitted evidence of confusion and that defendant may have acted in good faith. The Eleventh Circuit has also failed to take into consideration the "second-comer" doctrine.

III. The District Court and the Eleventh Circuit Have so Far Departed from the Accepted and Usual Course of Judicial Proceedings in Trademark Infringement Actions as to Call for an Exercise of this Court's Power of Supervision

As correctly observed by the District Court, a defendant is liable for infringement if the use of his mark "is likely to cause confusion, or to cause mistake, or to deceive." (765 F. 2d at 1506; 224 U.S.P.Q. at 727)(Appendix B-12).

infringement actions as to call for the exercise of the Supreme Court's power of supervision.

While a determination of the facts concerning the factors regarding likelihood of confusion is subject to the clearly erroneous standard:

> "The court's use of those factors, though, and its determination of likelihood of confusion based on the balancing of or relative weight given to each of its findings is a legal conclusion which is reviewable by this court as a matter of law." Plus Products v. Plus Discount Foods, Inc., 722 F. 2d 999, 1004-5 (2d Cir. 1983); also see Lindy Pen Company, Inc. v. Bic Pen Corporation, 725 F. 2d 1240, 1243 (9th Cir. 1984).
>
> "Because the ultimate conclusion of likelihood of confusion vel non - based on the facts properly found - is a legal matter, we must decide that question for ourselves." Kimberly-Clark Corporation v. H. Douglas Enterprises, Ltd., ___F.2d___, 227 U.S.P.Q. 541, 542 (C.A.F.C. 1985).

Therefore, the Supreme Court can consider these facts and make its own determination on the legal issue of whether there is a likelihood of confusion if ROSS and BOSS are concurrently used on bicycles by competitors.

The District Court twice stated that petitioner's mark ROSS is arbitrary with regard to bicycles (765 F. 2d at 1506-1507; 224 U.S.P.Q. at 728); and, that the mark ROSS "may be considered strong". (765 F.2d at 1508; 224 U.S.P.Q. at 729).

It has been observed that arbitrary marks are automatically strong marks and will thus be given a wide scope of protection. 2 J. McCarthy, Trademarks and Unfair Competition §11:4(d) (2d Ed. 1984). Furthermore:

> "the stronger the mark, the greater the likelihood of confusion, and therefore the more solicitous is the court to accord it protection against similar marks." 3A R. Callman, The Law of Unfair Competition Trademarks and Monopolies §20.43 (4th Ed. 1985).

Therefore, based on the District Court's own findings of fact, petitioner's mark ROSS is arbitrary and, therefore, strong and entitled to great protection.

The District Court specifically determined that there "are some obvious similarities between the appearance and sound of the mark ROSS and the mark BOSS. Both marks end in 'oss.'" (765 F. 2d at 1507; 224 U.S.P.Q. at 728)(Appendix B-15). A similarity in sound is particularly important in a situation, such as we have here, where the trademark (ROSS) is famous and has been extensively used for decades. Kimberly-Clark, supra. Though the

District Court also found that the marks have different meanings, a "difference in meaning if sufficiently distinct, may insulate against confusion which would otherwise be created by a phonetic resemblance, but this is exceptional" (emphasis added). 3A R. Callman, The Law of Unfair Competition Trademarks and Monopolies §20.13 (4th Ed. 1985).

Gertrude Stein once said that "a rose is a rose is a rose is a rose," and the same statement is true with bicycles. A bicycle is a bicycle is a bicycle is a bicycle. In view of the District Court's finding that petitioner "sells a complete line of bicycles" (765 F. 2d at 1504; 224 U.S.P.Q. at 726)(Appendix B-3), its determination that the products in this case "are not so similar as to be likely to cause confusion" (765 F. 2d at 1507; 224 U.S.P.Q. at 728)(Appendix B-17) is

simply wrong. The fact that there may be distinctions between petitioner's and respondent's bicycles, such as the size of the tubing, the style of wheels, etc. is of no moment. The fact is that both companies sell bicycles and thus the products must be considered to be identical for purposes of determining whether there is a likelihood of confusion.

The District Court also determined that petitioner and respondent "sell their products through the same type of retail stores and in some cases in the same stores" and that "the customers for the products in many cases are identical." (765 F. 2d at 1507; 224 U.S.P.Q. at 728-729)(Appendix B-18).

The District Court determined that petitioner and respondent "used similar methods of advertising their products" (765 F. 2d at 1508; 224 U.S.P.Q. at 729) (Appendix B-19).

Though the District Court determined that respondent knew of the ROSS trademark at the time that it adopted BOSS (765 F. 2d 1505; 224 U.S.P.Q. at 727)(Appendix B-7), the court also made a finding that respondent acted in good faith (765 F. 2d at 1508; 224 U.S.P.Q. at 729)(Appendix B-21). The court, however, did not take into consideration the "second-comer" doctrine which requires that "one entering a field already occupied by another has a duty to select a trademark that will avoid confusion." Wesley-Jesson, supra; also see Thompson Medical Company, supra; Beer Nuts, supra.

On the issue of actual confusion, the District Court determined that there was "no clear evidence of instances of actual confusion at trial" (765 F. 2d 1508; 224 U.S.P.Q. at 729)(Appendix B-21).

The evidence that was discussed by the District Court, however, related only to differences in construction of the bicycles, as opposed to determining whether the consumers were confusing the trademarks. It is irrelevant whether the bicycles themselves are distinguishable. It is only relevant whether the marks are confusingly similar.

If the findings are considered in the light most favorable to respondent, they can be summarized as follows: petitioner's mark ROSS is arbitrary and is thus a strong mark; the marks ROSS and BOSS are similar in appearance and sound; the products of petitioner and respondent are the same; petitioner and respondent sell their products through the same type of retail outlets and in some cases in the same stores and the customers for the

products in many cases are identical; and petitioner and respondent use similar methods of advertising their respective products. The only findings that were made in favor of respondent are that the marks are dissimilar in meaning, respondent acted in good faith and there was no clear evidence of actual confusion. Since as explained above, defendant's intent is relevant only when there is bad faith and the absence of actual confusion is not necessary to a finding of actual confusion, it can be seen that the District Court gave an inordinate weight to these factors. While it may have determined the findings correctly, it has totally misapplied the law and has made a determination that there is no likelihood of confusion when in fact the specific findings of the

trial court lead to the conclusion that there is most definitely a likelihood of confusion.

> "We are not loath to reach this conclusion because of the teaching of our predecessor court - recently reiterated by this court - that there is 'no excuse for ever approaching a well-known trademark of a competitor' and 'that all doubt as to whether confusion, mistake or deception is likely is to be resolved against the newcomer, especially where the established mark is one which is famous'". Kimberly-Clark, supra, ___F.2d at___, 227 U.S.P.Q. at 543.

CONCLUSION

This case improperly stands as federal precedential authority for the proposition that there can be no likelihood of confusion if the junior party, in good faith, adopts a mark that is similar in sound and appearance to the mark of the senior party for use on the same goods. It also stands as authority for the proposition that a newcomer may approach the well-known trademark of a competitor with a mark that is similar in sound and appearance and any doubts as to whether confusion, deception or mistake is likely will be resolved in favor of the newcomer if he acted in good faith.

These are precedents of significant magnitude and they conflict with the reasoning of other circuits.

This case mandates review.

WHEREFORE, petitioner Ross Bicycles, Inc. respectfully requests that its petition for writ of certiorari be granted.

DATED this fifth day of December, 1985.

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APPENDIX A

ROSS BICYCLES, INC.,

Plaintiff-Appellant,

v.

CYCLES USA, INC.,

Defendant-Appellee.

No. 84-3354

United States Court of Appeals,

Eleventh Circuit.

July 22, 1985.

Appeal from the United States District Court for the Northern District of Florida

Before GODBOLD, Chief Judge, HATCHETT, Circuit Judge, and TUTTLE, Senior Circuit Judge.

GODBOLD, Chief Judge:

Ross Bicycles sued alleging trademark infringement and false designation of origin. The facts are stated in the district court's opinion, reproduced as an appendix.

The district court held that there was no trademark infringement because there was no likelihood of confusion between the trademarks at issue and that there was no trade dress infringement because there was no likelihood of confusion between the trade dress of the two products. It also denied the defendant's request for attorney's fees and Ross' motions to amend the pre-trial stipulation.

[1] On appeal, Ross contends that the district court erred by finding no trademark infringement, failing to rule on its false designation of origin claim, failing to award its attorney's fees, and denying

its motions to amend the pre-trial stipulation. We affirm the district court's holding as to trademark infringement on the basis of its opinion. We also reject Ross' other contentions.

Count two of Ross's complaint asserted a claim for false designation of origin under 15 U.S.C. § 1125(a). It appears that the district court treated this as a claim of trade dress infringement. It held that its finding that there was no likelihood of confusion between the two trademarks meant that there was no likelihood of confusion between the trade dress of the two products. Despite treating the false designation of origin claim as a claim of trade dress infringement, the district court ruled properly.

[2,3] To prevail on a false designation of origin claim under 15 U.S.C. § 1125(a) a plaintiff must establish that the defendant adopted a mark confusingly similar to the plaintiff's mark such that there was a likelihood of confusion as to the origin of the goods. Conagra, Inc. v. Singleton, 743 F.2d 1508, 1512 (11th Cir.1984). The factors relevant to establishing this are identical to the factors relevant to establishing a likelihood of confusion with respect to trademark infringement under 15 U.S.C. § 1114. Compare id. at 1514 (false designation of origin) with John H. Harland Co. v. Clarke Checks, Inc., 711 F.2d 966, 973-79 (11th Cir.1983) (trademark infringement). Accordingly, the district court's finding of no likelihood of confusion with respect to trademark infringement precluded finding a likelihood of confusion with respect to the false designation of origin claim.

[4] The district court's denial of Ross' motions to amend the pre-trial stipulation was not error. The pre-trial stipulation was filed January 5, 1984. On March 7 Ross moved to amend the stipulation to add seven additional exhibits and three witnesses, all with respect to a survey it had conducted on February 3 and 26 concerning the likelihood of confusion issue. On March 26, at the opening of the trial, Ross moved to further amend the pre-trial stipulation to add Thomas Payne as a trial witness. Payne was to testify to an incident that occurred four months prior to the submission of the pre-trial stipulation.

Despite Ross' contentions that the district court indicated at the time of the pre-trial conference that discovery would remain open, that there was little time to conduct discovery, and that Payne's

testimony did not come to its attention until after the pre-trial stipulation, we hold that the district court did not commit a clear abuse of discretion. U.S. v. Koziy, 728 F.2d 1314, 1320 (11th Cir.1984), cert. denied, ___U.S.___, 105 S.Ct. 130, 83 L.Ed.2d 70 (1984). Cf. Typographical Service, Inc. v. Itek Corp., 721 F.2d 1317, 1319 (11th Cir.1983) (documentary evidence neither newly discovered nor related to any other previously admitted evidence); Jackson v. Seaboard Coast Line Railroad Co., 678 F.2d 992, 1019 (11th Cir.1982)(party calling witness on notice of evidence witness would rebut).

[5] Finally, because Ross has not prevailed on any issue it has not satisfied the prevailing party requirement of 15 U.S.C. § 1117 and is not entitled to attorney's fees.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

ROSS BICYCLES, INC., Case No.
Plaintiff, TCA 83-7354-MMP

vs

EAST COAST CYCLES
AND IMPORTS, INC.,
Defendant.

MEMORANDUM OPINION

The complaint in this case alleges infringement of a registered trademark, 15 U.S.C. §1114(1), and the false designation of the origin of defendant's bicycles, 15 U.S.C. §1125(a). The complaint seeks injunctive relief against defendant's

alleged infringement and false designation, an accounting of profits, damages, punitive damages, destruction of infringing materials, costs and reasonable attorneys' fees.

The action involves the production and sale of "cruiser" bicycles by plaintiff and defendant. The word "cruiser" is used throughout the industry to describe fat or balloon tire bicycles (larger than ten-speed bicycle tires) with large saddle seats and upright handlebars which permit the rider to ride sitting straight up. Cruisers generally come in single, three or five speeds. The cruiser bicycles became popular in the late 1970's and defendant developed its cruiser lines to tap into this market. In Florida, where defendant does most of its business, the cruiser can be used to ride on the beaches.

FINDINGS OF FACT

Plaintiff Ross Bicycles, Inc. (Ross) was incorporated in New York in 1946 under the name "Chain Bike Corporation". The name was changed to "Ross Bicycles, Inc." on May 21, 1982. Since 1946 Ross has manufactured and sold over ten million bicycles bearing the Ross trademark throughout the United States. Ross sells a complete line of bicycles including children's, BMX, touring, cruiser, mountain, racing and stationary exercise bicycles.

Plaintiff is the owner of the Ross trademark for bicycles and structural parts which has been registered with the United States Patent and Trademark Office. The Ross mark generally appears in two places. A logo consisting of the letter "R" above the name Ross in a rectangle appears on the head tube (the tube running

vertically between the handle bar and the front wheel). The name Ross, in one of several different letter styles and spacing, appears on the down tube (the tube running from the head tube to the crank). On some of plaintiff's bicycles a model name, without the name Ross, appears on the top tube (the tube running from the head tube to the seat tube).

Plaintiff advertises its bicycles in bicycling magazines and promotes their sales with catalogs, brochures and point-of-sale materials and by participation in trade shows and the sponsorship of racing teams. The total direct and indirect advertising budget for all Ross bicycles is over one million dollars a year.

Defendant East Coast Cycles and Imports, Inc., was incorporated in Florida in August of 1975. Defendant's principal, Donald E. Jamis, entered the bicycle

business in 1973. Defendant is engaged in the business of having bicycles manufactured for it for sale, and distributing various types of bicycle parts and accessories.

In 1979 defendant entered the cruiser bicycle market with its "Earth Cruiser" model, a bicycle manufactured in Taiwan and sold by retailers principally in Florida and neighboring states. In 1980 defendant added the "Taxi" model cruiser to its line, and in late 1982 defendant added the "Boss Cruiser" model to its line.

The Boss Cruiser was developed because of a perception by defendant that a large bicycle was needed to complete its line of cruisers. The Boss Cruiser was designed for above average height people to insure pedal knee clearance with the handlebars. Defendant wanted to provide a bike which

gave a "macho" or "strength" image. To accomplish this, the first frame developed was 23" (measured from the center of the sprocket to the top of the seat tube), and used oversized tubing (30% larger in diameter than the tubing used by Ross cruisers).

Ronald Jamis and John Register, an employee of defendant, designed the specifications of the Boss Cruiser. Mr. Jamis had some experience racing and building cars and motorcycles during highschool and college. Mr. Register had no experience in designing bicycles. The Boss Cruiser was designed over a one year period. In designing the Boss Mr. Jamis and Mr. Register rode various cruiser bicycles to compare and decide what features they wanted including the Ross Diamond Cruiser. After determining the approximate frame dimensions they desired,

the defendant communicated the measurements to a Taiwan factory. Five or six prototype frames were sent to defendant by the factory before defendant chose the final dimensions for the Boss. Defendant has sold over 7,000 Boss Cruisers.

At the time defendant adopted the name Boss Cruiser for its new bicycle it was aware of the use and ownership by plaintiff of the Ross mark in connection with bicycles. The name "Boss Cruiser" was developed by Mr. Jamis and his employees over a three to four month period. The name was chosen to give the bicycle a macho or strength image. Defendant obtained two trademark searches as to the availability of the name Boss Cruiser, and neither search cited plaintiff's mark. Although Mr. Jamis knew of the Ross mark, he did not copy it in naming the Boss Cruiser, nor did defendant

adopt the Boss mark to confuse the public or to capitalize on the Ross name.

The name "Boss Cruiser" appears on the front fork, on the top tube, and on the chain guard. There is no name or logo on the down tube. On the seat tube (the tube running vertically between the seat and the crank) a logo appears which consists of a "boss" figure and the words "The Boss". Since August 1983 the East Coast Cycle Import/Jamis logo appears on a "badge" on the head tube. During the first three months of production of the Boss Cruiser the badge only contained the word "Cycle". The last shipment of cycle badges occurred in February or March 1983.

Other than the badge placement on the head tube the logos and letter styling used on the Boss Cruiser and most Ross products are not similar in style or location.

Defendant has promoted the Boss Cruiser through trade shows, by use of posters and other point-of-sales materials, and through advertising in bicycling magazines. Plaintiff's and defendant's bicycles are distributed through the same types of stores.

The Ross Diamond Cruiser is the plaintiff's model which is closest in design and price range to the Boss Cruiser. When comparing the 23" Ross Diamond Cruiser to the 23" Boss Cruiser (the size first developed by defendant) the following differences are shown:

1) Boss has aluminum alloy wheels and Diamond has less expensive steel wheels;

2) Boss has a front brake which is about 25-30% more expensive than the brake used on the Diamond;

3) Boss has an aluminum alloy kickstand which costs about twice as much as the

Diamond's steel kickstand;

4) Boss has chrome front forks which are larger than the Diamond's painted steel front forks;

5) Boss has aluminum alloy pedals which are more durable and twice as expensive as the Diamond pedals;

6) Boss has a one piece seat which is more durable and expensive than the covered seat used on the Diamond;

7) The tubes on the Boss are 30% larger in diameter than the tubes used on the Diamond frame; and

8) The angles on the Boss frame are different than the angles used on the Diamond frame.

The comparison of the Boss Cruiser and the Ross Diamond Cruiser frames shows conclusively that defendant did not copy the Ross bicycle when developing the Boss Cruiser. Moreover, the Boss Cruiser

generally sells at a higher wholesale and retail price than the Ross Diamond Cruiser.

The plaintiff and defendant had a number of Florida bicycle store retailers as witnesses. Those witnesses showed that the "average" consumer buys a bicycle by visiting bicycle stores and asking for a style of bike (e.g. Cruiser) in a certain price range. Most consumers do not ask for a particular brand of bike when buying cruisers.

Several stores sell both the Boss and Diamond Cruiser. The two bicycles are the biggest competitor of each other. Because of the different angles in the two bicycle frames they ride different and the oversized Boss Cruiser tubes make the style of the bicycles look different. A number of the dealers said that the Boss Cruiser sold better than the Ross Diamond

because of the "flamboyant macho image". The market for the Boss Cruiser is generally for young males ages 18-25. Many dealers preferred the Boss Cruiser because of the aluminum alloy and chrome parts which reduce the amount of rust.

TRADEMARK INFRINGEMENT

Title 15 U.S.C. §1114(1) governs lawsuits for the infringement of a registered mark. That section provides that a defendant shall be liable for the use of an imitation of a registered mark if the use "is likely to cause confusion, or to cause mistake, or to deceive". Thus the critical question under this section is whether there is a likelihood of confusion, mistake, or deception between the registered mark and the allegedly infringing mark. John H. Harland Co. v Clark Checks, Inc., 711 F.2d 966 (11th Cir. 1983). Among the factors considered when

analyzing the likelihood of confusion between two marks are: 1) the type of trademark; 2) the similarity of design; 3) the similarity of the product; 4) the identity of the retail outlets and purchasers; 5) the similarity of advertising media used; 6) the defendant's intent; and 7) actual confusion. Id. at 972.

A. Type of trademark.

Plaintiff's mark Ross, while arbitrary, is the surname of a large number of people. See, Amstar Corp. v. Comino's Pizza, Inc., 615 F.2d 252, 260 (5th Cir. 1980); cert. denied, 449 U.S. 899, 101 S. Ct. 268, 66 L.Ed.2d 129 (1980). Arbitrariness refers to the quality of a mark, i.e., that it bears no relation to the service provided. Sun Banks of Fla. v Sun Federal Savings & Loan, 651 F.2d 311, 315 (5th Cir. 1981). The ultimate strength

of a mark is determined by a number of factors which establish its standing in the marketplace.

In addition to being a common surname, Ross is also the name of the sea arm of the South Pacific extending into Antarctica East of Victoria Land. The Ross Dependency is the section of Antarctica lying between 160°E and 150°W longtitude, claimed by New Zealand. While the Ross name's application to bicycles may be arbitrary, it still is not accorded the same degree of protection given such coined and fanciful terms as "Kodak" or "Xerox". See, Amstar Corp., 615 F.2d at 260.

B. Similarity of Design.

The similarity of design is determined by considering the overall impression created by the mark[s] as a whole rather than simply comparing individual features

of the marks. John H. Harland Co., 711 F.2d at 975. This consideration includes a comparison of the appearance, sound and meaning of the marks, as well as the manner in which the marks are used. Id.

There are some obvious similarities between the appearance and sound of the mark Ross and the mark Boss. Both marks end in "oss". Defendant's mark is followed by the word "cruiser", which is generic in the context of bicycles. Although the marks ultimately must be considered as a whole, the focus of the inquiry regarding appearance and sound and meaning is on the non-generic portion. John H. Harland Co., 711 F.2d at 976. With respect to the meaning, Ross is a common surname, while Boss conveys a definite meaning to the public. The word Boss commonly means one who exercises control or authority; being in charge; or

is slang for excellent.

Although there are similarities in sound between the marks, the difference in meanings makes them dissimilar in commercial impression. The mark Boss gives a specific mental impression to a buyer, while the mark Ross is non-descriptive. The Jamis mark appears on the head tube of the defendant's bicycle, and "Boss cruiser" appears on the front fork, top tube and chain guard. Plaintiff uses Ross as the brand for all of its bicycles. Ross appears on the head tube in the same position as defendant's Jamis mark and on the down tube. Many Ross bicycles carry a secondary model name, such as Diamond Cruiser, in the same manner as the Boss Cruiser model name.

The black [sic] lettering used to display the work [sic] "Boss" is not identical to the block lettering used by plaintiff for

its Ross mark. The Ross mark is displayed in various changing typestyles making it impossible to make one type of lettering unique to Ross.

C. Similarity of products.

The greater the similarity between the products and services the greater the likelihood of confusion. John H. Harland, 711 F.2d at 976.

The products in this case, although similar (both being bicycles), are not so similar as to be likely to cause confusion. As stated earlier, the size of the tubing, the style of wheels, pedals, seats, kickstands, and the difference in the frame angles on the Boss Cruiser and the Ross Diamond Cruiser are significant. The bicycles not only look different, the evidence showed that they had different riding characteristics.

While the inherent degree of similarity between two bicycles is one factor to be evaluated in assessing the likelihood of confusion, Sun Banks of Fla., 651 F.2d at 318, obvious differences in the products must also be taken into account.

D. Identity of Retail Outlets and Purchasers.

Dissimilarities between the retail outlets for and the predominant customers of plaintiff's and defendant's goods lessen the possibility of confusion, mistake or deception. Amstar Corp., 615 F.2d at 262. The plaintiff and the defendant sell their products through the same type of retail outlets and in some cases in the same stores. Although the customers for the products in many cases are identical, the Boss Cruiser is generally marketed to above average height males between the ages of 18-25. The Ross

Diamond Cruiser is not limited to such a market.

E. Similarity of Advertising Media Used.

The greater the similarity in advertising campaigns the greater the likelihood of confusion. Exxon Corp. v Texas Meter Exchange, Inc., 628 F.2d 500, 506 (5th Cir. 1980). In this case plaintiff and defendant use similar methods of advertising their products, relying primarily on magazine advertising.

F. Defendant's Intent.

The defendant's intent in adopting a mark is relevant in assessing the likelihood of confusion. Amstar Corp., 615 F.2d at 263. That a latecomer adopts another's name, deliberately seeking to capitalize on the other's reputation and benefit from the confusion, is an important factor for a court. Sun Banks v Sun Federal Savings & Loan Ass'n, 651

F.2d at 318.

There is evidence showing that the defendant, when designing the Boss Cruiser, rode the Ross Diamond Cruiser along with approximately ten other cruisers. However, the evidence presented showed that defendant did not use the Diamond Cruiser as a model when designing the Boss Cruiser. Almost every component part of the Boss Cruiser was different than the corresponding part used on the Diamond Cruiser. The difference in the component parts, as well as the oversized tubing and the different angles rebut any inference that defendant was attempting to benefit from the Ross style. There was no evidence that defendant has even attempted to "pass off" its product as that of the plaintiff. As already stated the evidence showed that defendant adopted Boss to give an appearance of strength which, from the

evidence at trial, was accomplished.

Additionally it was uncontroverted that the defendant had two tradename searches run on the name "Boss Cruiser". Although the fact that defendant sought trademark counsel does not preclude a finding that defendant intended to trade on plaintiff's good will, this Court finds that it is evidence of defendant's good faith in adopting the Boss Cruiser mark. See, John H. Harland Co., 711 F.2d at 977-78.

G. Actual Confusion.

Although evidence of actual confusion is not necessary to a finding of likelihood of confusion, it is nevertheless the best evidence of likelihood of confusion. Armstar,[sic] Corp., 615 F.2d at 263.

The plaintiff presented no clear evidence of instances of actual confusion at trial. The only evidence plaintiff presented at trial about actual confusion

was from three retail Ross distributors. These Ross distributors testified that an undetermined number of potential customers came into their Ross dealerships and asked for the Boss Cruiser. Defendant presented evidence by retail dealers, several who sold both the Boss Cruiser and the Ross Diamond Cruiser. These dealers gave evidence of how customers purchase bicycles. As stated earlier, the majority of consumers purchase bicycles by requesting a style in a price range. Then the retail dealer would show the consumer the various brands of bicycle in that style carried by that store. No customers or potential customers testified as to confusion. All the dealers who testified, plaintiff's and defendant's, stated unequivocally that they had no confusion as to the difference between the Boss Cruiser and the Ross line and used these

differences in selling the bicycles to consumers. In fact, the dealers, although disagreeing as to which bicycle was superior, all were able to point out significant and obvious differences between the bicycles.

H. Summary.

Having analyzed the key factors individually, the Court must now weigh the factors to determine whether there is sufficient evidence to find that there is a likelihood of confusion between the marks. Although the Ross mark may be considered strong, the two marks are far from identical in appearance and meaning. The products and the retail outlets are similar but many of the potential purchasers are different. This Court finds that defendant did not adopt the Boss name in order to benefit from the plaintiff's reputation, and the evidence of

actual confusion was slight at best. In fact, every witness who testified could easily point to differences which this Court could view with an inexperienced eye. Accordingly, this Court finds, after weighing the above factors, there is not a likelihood of confusion between the marks.

TRADE DRESS INFRINGEMENT

Section 43(a) of the Lanham Act, 15 U.S.C. §1125, states in relevant part:

> Any person who shall...use in connection with any goods or services, or any containers for goods ...any false description or representation, including words or other symbols tending falsely to describe or represent the same ...shall be liable to a civil action by ...any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

"Trade dress" involves the total image of a product. Original Appalachian Artworks, Inc. v. Toy Loft, Inc., 684 F.2d 821, 831 (11th Cir. 1982). In order to prevail on a claim for trade dress infringement the plaintiff must prove

1) that the trade dress of the two products is confusingly similar; 2) that the features of the trade dress are primarily non-functional; and 3) that the trade dress has acquired secondary meaning. John H. Harland Co., 711 F.2d at 980.

This Court need not discuss the first element of trade dress infringement, likelihood of confusion, in detail. The factors relevant to determining whether there is a likelihood of confusion between the trade dress of the two products are essentially the same as those relevant to determining whether there is a likelihood of confusion between the parties' trademarks. Sun-Fun Products, Inc. v Suntan Research & Development, Inc., 656 F.2d 186, 192 (5th Cir. Unit B 1981). The Court has already concluded that there was not a likelihood of confusion between the parties' marks. Although the scope of the

inquiry is somewhat broader under §43(a), see, Sun-Fun Products, Inc., 656 F.2d at 192, this Court still concludes that those factors do not support a finding of a likelihood of confusion between the trade dress of the plaintiffs' [sic] and defendants' [sic] products.

Since plaintiff has failed to prove the first element of trade dress infringement, and since all elements must be proved to prevail on such a cause of action, the Court need not discuss the remaining elements. See, Amstar Corp., 615 F.2d at 265. Accordingly, the Court finds that there is no trade dress infringement between the plaintiff's and defendant's marks.

ATTORNEY'S FEES

Title 15 U.S.C. §1117 allows a district court to award attorney's fees to the prevailing party "in exceptional cases".

Exceptional cases are those that involve acts which the courts have characterized as malicious, fraudulent, deliberate, and willful. Jellibeans, Inc. v Skating Clubs of Georgia, Inc., 716 F.2d 833, 846 (11th Cir. 1983). The instant cause is not an exceptional case and therefore defendant's request for attorney's fees is DENIED.

Accordingly, it is ORDERED that the plaintiff take nothing by this suit and the action be and the same is hereby DISMISSED on the merits. East Coast Cycles and Imports, Inc., is entitled to recover its costs from plaintiff. The Clerk is directed to enter a final judgment in accordance with this order.

DONE AND ORDERED this 30th day of April, 1984.

/S/ MAURICE M. PAUL
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-3354

ROSS BICYCLES, INC.,

Plaintiff-Appellant

versus

CYCLES USA, INC.,

Defendant-Appellee.

Filed
U.S. Court of Appeals
September 6, 1985
Spencer D. Mercer
Clerk

- - - - - - - - - - - - -

Appeal from the United States

District Court for the

Northern District of Florida

- - - - - - - - - - - - -

ON PETITION FOR REHEARING AND SUGGESTION

FOR REHEARING EN BANC

C-2

(Opinion July 22, 1985, 11 Cir., 198_, ____F.2d____).

Before GODBOLD, Chief Judge, HATCHETT, Circuit Judge, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal

Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

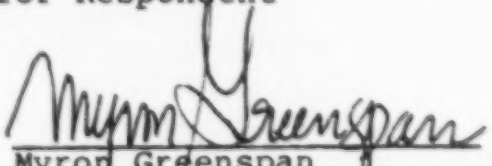
ENTERED FOR THE COURT:

/S/ JOHN C. GODBOLD
United States Circuit Judge

CERTIFICATE OF SERVICE

I, Myron Greenspan, one of the attorneys for petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the fifth day of December, 1985, I served copies of this Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, by mailing copies in a duly addressed envelope, with first class postage prepaid, to the following attorneys of record:

Albert Robin
Howard B. Barnaby
Robin Blecker & Daley
330 Madison Avenue
New York, New York 10017
Attorneys for Respondent



Myron Greenspan
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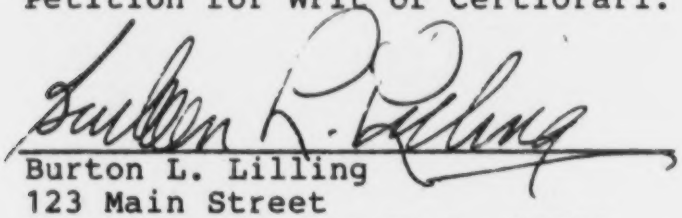
AFFIDAVIT OF MAILING

I, Myron Greenspan, one of the attorneys for petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the fifth day of December, 1985, I deposited in the United States Post Office located at 100 Fisher Avenue, White Plains, New York, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, this Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Myron Greenspan
Law Offices of Lilling & Greenspan
123 Main Street
White Plains, NY 10601
Telephone: (914) 684-0600
Attorney for Petitioner

STATE OF NEW YORK)
: ss.
COUNTY OF WESTCHESTER)

On this fifth day of December, 1985 before me personally appeared Myron Greenspan, who, being duly sworn, did depose and say that he is the attorney of record for the petitioner herein, that he is a member of the Bar of the Supreme Court of the United States and that he has read and signed the foregoing Affidavit of Mailing of the within Petition for Writ of Certiorari.



Burton L. Lilling
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No. 24-2364000
Qualified in Westchester County
Commission Expires March 30, 1987